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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

FEDERAL TRADE COMMISSION, *Petitioner,*

v.

THE PROCTER & GAMBLE COMPANY, *Respondent.*

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

This Brief is filed on behalf of The Procter & Gamble Company ("Procter") in opposition to the Petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit, filed by the Solicitor General on behalf of the Federal Trade Commission ("Commission").

The Petition was filed on July 13, 1966. By order of the Clerk of this Court, the time for filing this Brief in Opposition was extended to September 9, 1966.

QUESTION PRESENTED

The Petition's statement of the "Question Presented" ignores the fact that what is involved here is simply the *unanimous* reversal of a decision of the Commission by a reviewing court of appeals, upon a finding that the Commission's decision was not supported by substantial evidence on the record as a whole.

The only question which can properly be presented here is whether a showing has been made that the court of appeals has failed to make a "fair assessment" of the record or has so "misapprehended or grossly misapplied" its function as a reviewing court as to warrant review by this Court.

The Petitioner's effort is to have this Court disregard the decision of the court of appeals, engage in another review of the record, and decide the issues *de novo*. This in spite of the fact that the decision below expressly and correctly applied controlling principles of law heretofore enunciated by this Court.*

STATUTES INVOLVED

In addition to the "Statutes Involved" as set forth in the Petition, there is also involved Section 10 (e) of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. § 1009(e), which provides in pertinent part:

> "(e) . . . the reviewing court shall . . . (B) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (5) unsupported by substantial evidence . . . ."

STATEMENT

The "Statement" of the case as set forth in the Petition fails to present a full and fair "Statement" as to the decision which this Court is asked to review. Omitted entirely from the "Statement" are certain significant facts set forth in the Opinion below. References to other facts are both inadequate and inaccurate.

In supplementation of the Statement in the Petition, the following pertinent facts and circumstances must be noted:

(a) *The nature and import of the first decision of the Commission.*

The Petition contains a passing reference to the fact that, when this case first came before the Commission, it

*It is also urged in the body of the Petition that the decision below is in conflict with a decision of the Court of Appeals for the Seventh Circuit. As we shall later show, this contention is without merit.

reversed the initial decision of the Trial Examiner and remanded the case for additional evidence. Pet., p. 3.* This ignores the real significance of this first Commission decision. For, as stated by the court of appeals, a *unanimous* Commission there held that "the evidence was insufficient to support a finding of illegality." Op., p. 24.

Thereafter, and in the course of a second appeal, the findings and conclusions of the first Commission were rejected by a new body of commissioners. Op., p. 36. The primary importance of this is that the decision of this second Commission was based on the same record as had been passed upon by the first Commission.** As the court of appeals said:

> "The second Commission's decision was based entirely on the record submitted to the first Commission, which that body had ruled to be insufficient to support a finding of illegality." Op., pp. 24-25.

This gives rise to the unique circumstance, completely unnoted in the Petition, that the two Commissions are in irreconcilable conflict. Thus it cannot be said that here there is any decision by the Commission which reflects any consensus of Commission "expertise" or "informed" Commission judgment.

Moreover, this is an adversary proceeding in which the Commission had the burden of establishing a violation of Section 7. Where, as here, two sets of Commissioners have reached opposite determinations on the same record, that fact, in and of itself, is of very real significance in determining whether the Commission has sustained its burden.

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*"Pet." refers to the Petition. "Op." refers to the Opinion of the court of appeals which has been printed as Appendix A to the Petition at pp. 19-40. "Comm'n Dec." refers to the Commission's Decision which has been reprinted as Appendix C to the Petition at pp. 43-127.

**This circumstance occurred because evidence introduced on the remand ordered by the first Commission was held by the second Commission to be "needlessly" in the record. Op., p. 34.

(b) *Pre-merger status of Clorox Chemical Co.*

The court of appeals referred to the following facts respecting the acquired company:

1. Clorox Chemical Co. ("Clorox") was a long established, successful, well managed and well financed company. Its sole business was the manufacture and sale of household liquid bleach. Op., pp. 25, 29.

2. Procter "had never engaged in the manufacture or distribution of household liquid bleach," and "was not a competitor, supplier or customer of Clorox." Op., p. 26.

3. The "merger negotiations were initiated by shareholders of Clorox," (Op., p. 25) who, by reason of "reaching the age of retirement . . . wanted to transform their stock into a marketable security of a successful company." Op., p. 36.

4. ". . . Clorox, and not Procter, had the know-how in the household liquid bleach business as evidenced by its success in starting from scratch and building a $12,000,000 corporation with sales of nearly $40,000,000 annually and obtaining over forty-eight per cent of the market." Op., p. 29.

5. "The finances of Clorox, although not comparable with Procter's, were entirely adequate for its purpose and enabled it to continue its growth and to maintain and increase its share in the market." Op., p. 29.

(c) *Description of the industry:*

The household liquid bleach industry, both before and after the merger, was composed of some 200 producers (Op., p. 27) located throughout the country. As the Commission itself had found, "the equipment, raw materials and labor required in the manufacture of liquid bleach are relatively inexpensive, and neither the product nor its process is a subject of a patent or trade secret." Comm'n Dec., p. 53.

(d) *Reason for the success of Clorox.*

The Petition notes that all "liquid bleaches are chemically identical" and assumes that the success of Clorox was due solely to extensive advertising. Pet., pp. 4-5. But the court of appeals took note of this very point and said:

> ". . . Clorox attributed its success to its maintaining a high degree of quality control in its production process. The fact that prior to the merger its sales accounted for nearly fifty per cent of the market, would seem to indicate its product's wide acceptance and preference by housewives. . . . But even though the advertising [of Clorox] was extensive, the product had to be good in order for it to obtain repeat-purchases by the housewife." Op., pp. 27-28.

(e) *Potential competition.*

The Petition erroneously states:

> ". . . Procter carefully considered entering the liquid bleach industry on its own." Pet., p. 7.

The court of appeals determined that there was no evidence indicating that Procter ever had any interest in entering the business by internal expansion. To the contrary, the court referred to the only evidence bearing upon any such probability. This was a recommendation that Procter *not* go into the business on its own. The court of appeals stated:

> "There was no evidence tending to prove that Procter ever intended to enter this field on its own. Its promotion department, *in considering whether to enter into the proposed merger* with Clorox *recommended against* Procter going into the bleach business on its own."* Op., p. 33.

and

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*Unless otherwise indicated, all emphasis is supplied.

> "There was no reasonable probability that Procter would have entered the household liquid bleach market but for the merger." Op., p. 36.

(f) *Claimed competitive advantages.*

The court of appeals dealt with the alleged competitive advantages relied upon by the Commission respecting distribution, marketing, advertising and financial resources. Op., pp. 29-30. It held that there was no substantial evidence to support the Commission's findings that any of such alleged advantages were probable or, even if probable, would be likely to bring about any substantial lessening of competition in the industry.

(g) *Post-acquisition evidence.*

As is indicated in the Petition, the record contains evidence respecting competitive conditions in the industry for the four years following the acquisition. The Petition's reference to this evidence is inadequate. Passed over entirely are facts, noted in the Opinion below, demonstrating that in the post-acquisition years there was a most substantial increase in the volume and dollar amount of the sales by Clorox's competitors and that year after year those competitors sold more bleach for more money than in the pre-acquisition years.

The court of appeals said:

> "And the post-merger evidence was to the effect that the other producers subsequent to the merger were selling more bleach for more money than ever before." Op., p. 28.

(h) *Predatory practices.*

The court of appeals further found:

> "There was no evidence that Procter at any time in the past engaged in predatory practices, or that it intended to do so in the future." Op., p. 32.

We think that the foregoing supplementation is essential to any consideration of the Petition by this Court. For it plainly indicates that the decision below was confined to the particular (and indeed sometimes unique) facts and circumstances of this particular record. And it was the totality of such facts and circumstances which was relied upon by the court of appeals in arriving at its determination that the Commission's decision was not supported by substantial evidence.

REASONS FOR DENYING THE WRIT

1. The court of appeals properly discharged its reviewing function. Its decision should not be the subject of further review.

There can be no valid dispute as to the basis of the decision below. It was summarized in the court's opinion as:

> "Considering the record as a whole, we are of the opinion that the decision of the second Commission is not supported by substantial evidence." Op., p. 37.

That this was the decisive question below was recognized by Petitioner itself. It framed the issue before the court of appeals in the following language:

> "Was the Commission's holding that Procter's acquisition of Clorox Chemical violated Section 7 *supported by substantial evidence* and in accordance with law?"

And the Commission's argument below was directed to its contention that, on the whole record, there was substantial evidentiary support for its decision. It was this precise contention which the court of appeals rejected.

(a) Analysis of the review and decision below.

In its review of the Commission's decision, the court of appeals was first faced with the singular circumstance that two sets of Commissioners had passed upon the decisive

issue here. As the court noted, the first decision of the Commission had ruled that this record was "insufficient to support a finding of illegality"* (Op., p. 24); and the "second Commission rejected the findings of the previous Commission" and arrived at a diametrically opposed conclusion. Op., p. 36.

The court of appeals was cognizant of the consequences of this insofar as any single "Commission judgment" was concerned. In adverting to this, it said:

> "In considering the question of the substantiality of the evidence, we cannot ignore the two conflicting opinions of the Commission *based upon the same evidence.*"** Op., p. 35.

Faced with this extraordinary situation, the court then proceeded to test the validity of the decision of the second Commission against the evidence in the record. It found that such evidence could not measure up to the required standards.

The court of appeals recognized that in line with the provisions of Section 7 itself, and the decisions of this Court interpreting it, two factors are essential to any determination of illegality. One is that there be the "probability" that anti-competitive effects would result from a chal-

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*While the court of appeals noted that the first decision was "interlocutory in nature" and "subject to reconsideration and change" (Op., p. 22), it was such in only one sense. The Commission reserved its jurisdiction to determine whether the post-acquisition evidence, which it had directed should be adduced on the remand, established any facts contrary to the conclusions at which it had arrived on the record before it. In no sense was the decision of the first Commission equivocal or indecisive in respect of the insufficiency of the evidence in the record prior to the remand.

**Thus, the unique circumstances of this case permit no reliance upon any special expertise or experience of the Commission. For the necessary premise for any such reliance is that there be an informed administrative decision which reflects the Commission's considered judgment respecting the ultimate conclusions necessary to find a violation of the statute. Here, no such judgment was before the reviewing court. Here, there was no consensus of any alleged "expertise" of the Commission.

lenged acquisition. The other, that any such effects would probably result in a substantial lessening of competition.

As to these requisite "probabilities", the ultimate findings of the Commission were predicated upon a number of subsidiary findings. These embraced all of the areas in which it was claimed that the effects of the acquisition might be manifested. They dealt with, *inter alia*, the conditions of competition in the industry at the time of the acquisition; the probability and effect of all of the alleged competitive advantages which the Commission charged might flow from the acquisition; the consequences allegedly attaching to the availability of Procter's resources in the operation of the Clorox business; the alleged impact of the acquisition upon actual and prospective competitors; and the alleged elimination of Procter as a potential competitor in the liquid bleach industry.*

It was these findings which were the very core and essence of the Commission's decision.** The Commission relied upon the totality of such findings in concluding that the acquisition violated Section 7. It expressly disclaimed any consideration or determination of whether any "one or more of these factors, taken separately, would be dispositive of the case." Comm'n Dec., p. 105.

As is apparent from its Opinion, the court of appeals made an independent, painstaking review of the record in this case. It dealt expressly with each of the Commission's controlling findings and with the evidence pertaining to each.

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*Of course, there is no claim that Procter and Clorox were "competitors" in any sense of the word. Nor is there any claim that the acquisition brought about any automatic elimination of competition. Nor does the Petition claim that it brought about any increase in concentration within the industry.

**The Petition omits any mention of the fact that the record here contained 6346 pages of testimony and 858 Exhibits. It was the product of extended hearings held throughout the country. It touched upon every aspect of the acquisition which competent counsel for the Commission could conjure up as a ground for invalidating the merger. See Joint Appendix, Volumes 1-4, copies of which have been certified to this Court.

There is nothing to indicate that the court's review did not represent "a fair assessment" of the record. Nor, indeed, is any such suggestion advanced in the Petition.

The court of appeals rejected each of these controlling findings as being unsupported by substantial evidence.* In making this determination the Opinion below discloses that the court thoroughly understood and carefully followed the teachings and rulings of this Court respecting the scope and meaning of Section 7.

Thus, the court expressly noted that conglomerate mergers come within the proscription of the statute. *Federal Trade Commission* v. *Consolidated Foods Corp.*, 380 U. S. 592; *United States* v. *Philadelphia National Bank*, 374 U. S. 321; *Brown Shoe Co., Inc.* v. *United States*, 370 U. S. 294. It recognized that Section 7 was concerned with arresting anti-competitive tendencies in their incipiency. *United States* v. *Continental Can Co.*, 378 U. S. 441; *Philadelphia National Bank* and *Brown Shoe*. While acknowledging that mere possibility is not enough, it did not hold the Petitioner to any proof of certainty. *United States* v. *Penn-Olin Chemical Co.*, 378 U. S. 158; *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U. S. 316. It clearly applied to this acquisition the criteria laid down by this Court as to the meaning and significance of "potential competition" in a Section 7 proceeding. *United States* v. *El Paso Natural Gas Co.*, 376 U. S. 651 and *Penn-Olin*. It scrupulously adhered to decisions of this Court respecting the relevance of, and weight to be attached to, post-acquisition evidence. *Consolidated Foods* and *du Pont*. Respecting the legality of this conglomerate merger, it gave expression to

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*In passing we note that at two places in the Petition it is stated "the court of appeals did not disturb the Commission's factual findings." Pet., pp. 7, 11. This claim cannot be reconciled with the Opinion of the court of appeals. For certainly, as is abundantly evident from that Opinion, the court not only "disturbed" controlling and essential findings of the Commission, it held them to be without evidentiary support, whether they are to be classified as "factual" findings or otherwise.

the tests enunciated in *Brown Shoe* and other decisions of this Court.

(b) Recognized principles respecting the exercise of this Court's reviewing function should lead to the denial of the Petition.

In the light of all of the foregoing, the principles of review enunciated by this Court in *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474, and cases following it, are clearly applicable here. This Court there gave expression to the function and authority of Courts of Appeals in reviewing decisions of administrative agencies. It pointed out that such agency decisions must be supported by "substantial evidence"; that whether there is such "substantial evidence" is a question which the Congress has placed in the keeping of the Courts of Appeals; and that this Court should intervene only in the "rare" instance where the standard of review was "misapprehended or grossly misapplied."*

The Opinion below on its face plainly shows that the court of appeals fully understood its reviewing function.

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*However unnecessary, we here set forth the significant language in this Court's opinion (concurred in by a unanimous Court):

> "Congress has imposed on [reviewing courts] responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. . . .
>
> ". . . .
>
> "Our power to review the correctness of application of the present standard ought seldom to be called into action. *Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.*" 340 U. S. at 490-91.

The foregoing principles have been consistently reaffirmed and followed by this Court.

Contrary to the suggestion in the Petition that the court of appeals only "purported" to be appraising the evidence, the clear fact is that it dealt with each facet of the Commission's decision. It concluded that there was no substantial evidence to justify that decision.

We repeat: This is an "evidence" case. The Petitioner's effort to treat it as something else and to imply that a departure from the principles of *Universal Camera* is in order here, are without merit.

We do not suggest that this Court is unalterably committed to the denial of review to all determinations of Courts of Appeals which profess to be predicated upon an evaluation of the substantiality of evidence. We do say, however, that this Court should require a compelling showing that questions are raised which require a departure from the salutary principles of judicial review discussed above. The Petition here contains no such showing.* Intervention here by this Court would improperly impugn the authority, ability and prestige of Courts of Appeals. It would be an ill-advised enlargement of the proper judicial functions of this Court.

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*Compare the petition for certiorari in *Federal Trade Commission* v. *Consolidated Foods*, No. 422, October Term, 1964, from which certain language has been carried over into the Petition here. But that petition stressed two factors as warranting review: (a) the competitive significance of a merger which "introduces" a recognized anti-competitive factor, such as "reciprocity", into an industry; and (b) whether post-acquisition evidence could be given "decisive weight" by a reviewing court.

Here no contention is advanced that the effect of the acquisition was to introduce any one of the "congeries" of recognized anti-competitive practices, such as reciprocity, which automatically bring about a lessening of competition. Respecting post-acquisition evidence, this Court's decision in *Consolidated Foods* established the principles of law which control the evaluation of such evidence in a Section 7 case. No further exposition of these principles is required. There being no open questions of law raised here, we urge that the grant of certiorari in *Consolidated Foods* is in no sense any precedent for the grant here.

2. The Petition states no valid reasons why there should be any departure from the principles of review discussed above.

Petitioner understandably omits any reference to the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. § 1001 *et seq.*, as amended) or to the principles of review discussed above. It urges that, regardless of the determination by the court of appeals respecting the substantiality of the evidence, its decision is "unsound". Pet., p. 11. But when analyzed, the reasons which are advanced for this contention all concern the substantiality of the evidence. All of them are designed to induce this Court to re-examine the factual record in this case. In no way do they sustain the Petitioner's burden of demonstrating that this is a proper case for review.

(a) The court of appeals did not exceed its authorized scope of review in rejecting "predictions" of the Commission.

The Petition asserts that the court of appeals was in error in rejecting the Commission's predictions as to the "likely course of future competition" in the liquid bleach industry. It says that Section 7 requires a "prediction" of future effects and that the Commission was given the "task of making such predictions." It then concludes that the court of appeals was without power to substitute its own "predictions" for those of the Commission.* Pet., p. 12.

In committing enforcement of Section 7 to the Federal Trade Commission, the Congress did not endow the Commission with any power to make *ad hoc* "predictions" as to violations. It did not authorize determinations based upon hunches or guesswork, or dictated by the predilections of members of the Commission. It plainly intended that the

*Apart from any question of the validity of this statement, the court of appeals here did not "substitute" its own predictions. It merely held that the "predictions" of the second Commission were not supported by substantial evidence.

Commission's authority in this area, just as in other areas in which it functions, be controlled by the Administrative Procedure Act.

This Court has directly said that the Commission's determinations as to the probability of substantial anti-competitive effects have no immunity from review. They must be supported by substantial evidence, whether they be labelled "predictions" or given some other name. Thus, in *Consolidated Foods,* the majority opinion states that the Commission's finding of probability should be honored "*if* there is substantial evidence to support it." 380 U. S. at 600. And in the concurring opinion of Mr. Justice Stewart it is stated:

> "The touchstone of § 7 is the probability that competition will be lessened. But before a court takes the drastic step of ordering divestiture, the evidence must be clear that such a probability exists." 380 U. S. at 605.

and that

> ". . . the record should be clear and convincing that the requisite probability is present."* *Ibid.*

The evaluation by the court of appeals of the substantiality of the evidence, assertedly supporting the Commission's "predictions", was thus clearly within its authorized scope of review. Its rejection of the Commission's "predictions" because they had no evidentiary support furnishes no basis for departing from the principles enunciated in *Universal Camera.* Petitioner's contentions in respect of these "predictions" are nothing more than an effort to induce this Court to entertain another review of the factual record in this proceeding.

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*Certainly there is nothing in the foregoing to justify the Petitioner's citation of the decision in *Consolidated Foods* for the proposition that Commission "predictions" in a Section 7 case are not a proper subject for court review. Pet., p. 12.

(b) The treatment by the court of appeals of the post-acquisition evidence was in accord with principles established by this Court.

Petitioner is critical of the court of appeals for attaching what it says is "great weight" to the post-acquisition evidence. Pet., p. 14. It does not claim that the court should not have considered this evidence. Nor does it claim that the court gave it any conclusive significance. And, in fact, the court expressly disclaimed doing so.

As the Opinion below shows, the court adverted to this evidence in a purely negative way. It merely held that evidence respecting the post-acquisition years did not show that any lessening of competition had occurred. It neither "stressed" the importance of this evidence nor did it give it any "great weight". The decision below was entirely consonant with the principles expressed by this Court in *Consolidated Foods.**

In line with those principles the court of appeals properly held that "the Commission was in error" in according "no weight" to the post-acquisition evidence, and in holding that it was "needlessly" in the record here. Op., p. 34. That error may well be attributable to the fact that the Commission's decision preceded that of this Court in *Consolidated Foods.* But whatever the reason, error it was.

In seeking to minimize the import of this post-acquisition evidence, the Petition omits reference to portions of it which were expressly referred to in the Opinion below. As there noted, it established, without contradiction, that all of the competitors of Clorox, in the years following the acquisition, had substantially increased their business—that these competitors in every such post-acquisition year had sold more bleach for more money than in any year prior to

*The Petitioner's inflated characterizations of the treatment of this evidence by the court of appeals represent an unwarranted effort to compare such treatment with that which was criticized by this Court in *Consolidated Foods.* No such comparison is tenable.

the acquisition. Op., pp. 28, 34. This evidence has obvious relevance in the light of the Commission's conjectures and "predictions" as to a probable lessening of competition.

Certainly this evidence of the improved position of competitors has a direct bearing on the Petitioner's assumptions as to adverse "psychological" reactions which would "deter" their competitive efforts. Pet., pp. 12-13. For it indicates that in the years since the acquisition their competition has been vigorous and successful. And there is no suggestion in the Petition that there was any other evidence showing that in the post-acquisition period there had been any lessening of competition in the industry.

Under the circumstances here, Petitioner's contention that the treatment of the post-acquisition evidence by the court of appeals requires review by this Court is utterly lacking in merit.

(c) The court of appeals did not err in rejecting the Commission's conclusion that the merger eliminated Procter as a potential competitor.

In attempting to give some semblance of validity to the contention that the court of appeals erred in this respect, Petitioner unfortunately has taken liberties with the record and with the decision of the court of appeals.

It states as a fact that "Procter carefully considered entering the liquid bleach industry on its own." Pet., p. 7. As we have said (*supra*, pp. 5-6), the court of appeals found no evidence to support such a claim, or to indicate that Procter had any interest in getting into the liquid bleach business by internal expansion. To the contrary, as noted by the court of appeals, the only evidence bearing on the matter was the recommendation by Procter's promotion department *"against* Procter going into the bleach business on its own."* Op., p. 33.

*This "recommendation" was made as a part of an overall analysis of the financial factors involved in the offer made to Procter by the Clorox stockholders.

Next, the Petition asserts that it was an "indisputable fact" that Procter was "ready, willing and able" to produce liquid bleach itself in competition with Clorox. Pet., p. 16. The only thing about this which is "undisputed" is that there was no evidence, as the court of appeals held, even to suggest that Procter was either a "ready" or a "willing" entrant into the business.* Op., pp. 33, 36.

The absence of any evidentiary support for the Commission's conclusions properly compelled the determination by the court of appeals that "there was no reasonable probability that Procter would have entered the household liquid bleach market but for the merger." Op., p. 36.

In purporting to deal with prior decisions touching upon this "potential competition" issue, the Petitioner has been loose with its citations. The reference to *El Paso* simply highlights the tenuousness of its argument. There, this Court pointed to well-documented efforts on the part of the acquired company to gain access to the market. No doubt existed respecting its intent and desire to compete with El Paso. What is more, the overt activities of the acquired company, in attempting to enter the market, had demonstrably affected competition. They had actually forced the acquiring company to reduce its price in California.

The record in *El Paso* is indeed a far cry from anything here. For there is not even the claim here that Procter had ever threatened to enter the market. Nor does Petitioner point to any evidence that Procter—"standing on the sidelines"—had, in any manner whatsoever, influenced the operations of Clorox or, for that matter, of any other company

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*As to the theoretical question of Procter's "ability" to enter the industry, there is nothing in the Petition suggesting the existence or foreseeability of any reasons why Procter should commit its resources to this business. Respecting this, the Opinion below noted:

> "There is no evidence that it had any such intention. The share of the market it could have captured, whether it could have permanently retained it, and the cost, are matters of conjecture." Op., p. 31.

in the liquid bleach industry. As the Opinion of the court of appeals demonstrates, there is nothing to sustain the Commission's observation that Procter, prior to the acquisition, was "a substantial competitive factor in the liquid bleach market." Comm'n Dec., p. 116.*

Further, in *Penn-Olin*, this Court noted, in remanding the proceeding to the lower court, that findings as to "reasonable probabilities" respecting "potential competition" and the probable effect of the elimination thereof must be made on "evidence in the record on which to base such a finding." 378 U. S. at 175-76. In its review here, the court of appeals determined that there was no such evidence. Op., pp. 33, 36.

Recognizing the infirmities in its claim that Procter was a *likely* entrant, the Petitioner baldly asserts that "to *Clorox*, Procter was, surely, a continuing threat to enter" the industry. Pet., p. 17. It apparently is saying here that the "probability" of Procter's entry is relatively unimportant. It is saying that the important thing is that Clorox would *think* that Procter was a threat to enter, and would shape its policies accordingly.

The first answer to this attenuated speculation is to be found in the Opinion below. Referring to the claim that Procter could be deemed to be on the "brink" of entering the market, and pointing out that this was simply another instance of Commission findings based upon "'treacherous conjecture', possibility, or suspicion," the court of appeals said:

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*Petitioner's citation to *Continental Can* is also inapposite. See Pet., p. 16. The decision there took into account the fact that in certain phases of the container business the acquired and acquiring companies were definitely competitors in respect of promoting the end use of their products. The word "possibility" to which Petitioner refers was used by this Court with reference to the extension of the interchangeability of the products of the competing companies. This Court did not hold that the "mere possibility" of entry can stamp a company as a potential competitor in the Section 7 sense. 378 U. S. at 495-96.

> "An illustration of this is the finding that Procter was on the 'brink' of entering the market on its own. Household liquid bleach is an old product; Procter is an old company. If Procter were on the brink it is surprising that it never lost its balance and fell in during the many years in which such bleach was on the market. It had never threatened to enter the market. *Cf. United States* v. *Penn-Olin Chem. Co., supra,* at 173."* Op., p. 36.

We urge that on the face of the matter, the foregoing circumstances indicate that there would not even be a "rational basis" for any concern by other members of the industry that Procter would move into it on its own.

But there is an additional factor which emphasizes why, on this record, no review by this Court of this "potential competition" point would be justified. This has to do with the circumstances under which this issue was first raised in this case—it was injected as an opportunistic afterthought.

No claim that the acquisition eliminated Procter itself as a potential competitor was asserted in the complaint in this proceeding or advanced during the entire course of the trial proceedings. At no time prior to the close of the record here was there any indication that such a claim would be relied upon. It was raised for the *first* time during the course of a *reargument* before the Commission on respondent's second appeal. Under such circumstances, the Commission's treatment of this issue and the significance at-

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*Nothing is pointed to indicating that any actual or prospective changes had occurred in the household liquid bleach industry which would suggest that Procter's entry into the industry was more likely than it had been in prior years. Unlike the market factors emphasized by this Court in *El Paso* and *Penn-Olin*, there is no showing here that the bleach market was one in which there was a rapidly expanding demand for the product, or in which there were technological breakthroughs or other market developments which could be said to have made entry more attractive. *Cf.* United States v. Penn-Olin Chemical Co., 378 U. S. at 174-75; United States v. El Paso Natural Gas Co., 376 U. S. at 658, 660.

taching to it was to deny to respondent administrative due process in this adversary proceeding.* *Morgan* v. *United States*, 304 U. S. 1, 14-15, 18-19; Section 5(a) of the Administrative Procedure Act, 60 Stat. 239, 5 U. S. C. § 1004(a).

For had any such issue been raised, the respondent would have had the opportunity to prove its invalidity. The Procter officials who had testified in the course of the proceedings would have had the opportunity to deny that there was any likelihood that Procter would go into the business on its own. They would have had the opportunity to demonstrate why it would have been improvident for Procter to do so.

The same observations apply to Petitioner's assertions that Clorox regarded Procter as a likely entrant and that this had an influence upon Clorox's business policies and practices. The principal officials of Clorox testified at length in this proceeding. Had any such issue been raised, they could have been interrogated concerning it. And they would have had the opportunity to brand it as the baseless hypothesis that it is.

This, again, is but another of the extraordinary circumstances of this case. We point to it as further indicating why no review by this Court is in order.

3. The decision below is not in conflict with the decision of the Seventh Circuit in the *Ekco* case.

This brings us to Petitioner's contention that the decision of the court of appeals is in conflict with the decision of the Seventh Circuit in *Ekco Products Co.* v. *Federal*

*The impropriety of the Commission's conduct was raised before the court of appeals, which noted in its Opinion:

> "The Commission urges that the merger eliminated a potential competitor, namely Procter. This issue was never raised until after all the evidence was in and the appeal was taken to the second Commission." Op., pp. 32-33.

Trade Commission, 347 F. 2d 745 (1965). This is simply an effort to buttress an insufficient petition by urging that it raises an issue which comes within the ambit of recognized criteria for the exercise of this Court's jurisdiction. There is no merit to it. For as to the only principle of law involved, the two circuits are in complete accord.

In *Ekco*, the Commission had found that the acquisitions there involved violated Section 7. The Seventh Circuit held that there was adequate evidentiary support for the Commission's decision. It expressly premised its judgment upon a combination of particular circumstances reflected in the record in that case. Included among these was the fact that the merger made possible, and resulted in, the acquisition by the acquired company of a competitor of that company. Such acquisition was concededly a violation of Section 7. Moreover, it served to entrench further the virtual monopoly position which the acquired company had in its product line.

The decision of the Seventh Circuit makes it clear that it was the combination of this and other circumstances —including evidence respecting the acquiring company as a "potential competitor"—which led to its conclusion that Section 7 had been violated. The court confined its holding to the "narrow factual situation" which was before it. 347 F. 2d at 751. It expressly said: ". . . we limit this holding to the facts of this case." 347 F. 2d at 753. Its decision represents no precedent of general application.

The true nature of the decision in *Ekco* and the plain limitations which the Seventh Circuit placed upon it are wholly ignored in the Petition. What Petitioner has done here is to single out one of the factors responsible for the decision—the one relating to "potential competition". Then, as to this lone issue, it urges that the decision below is irreconcilable.

But even if the decision in *Ekco* were confined to this point of "potential competition", there still would be no conflict between the circuits. For, both decisions hold that before there can be a finding that an acquiring company is a "potential competitor", there must be evidence establishing a "reasonable probability" that it would enter the business on its own.

Here, unlike *Ekco,* the court of appeals determined that there was nothing to support the speculation that Procter would enter the liquid bleach business by internal expansion. The court of appeals was fully aware of the *Ekco* decision and directly referred to it. It expressly negatived any inference that the decision here ran counter to that of the Seventh Circuit, noting:

> "The facts were different in *Ekco* and the court very carefully limited the decision to the facts of that case." Op., p. 35.

Two decisions which are completely in accord in respect of controlling principles of law cannot be said to be in "conflict" where they deal with different factual circumstances. See the opinion of this Court in *Wisconsin Electric Co.* v. *Dumore Co.,* 282 U. S. 813:

> "It appearing that the asserted conflict in decisions arises from differences in states of fact, and not in the application of a principle of law, the writ of certiorari is dismissed as improvidently granted."

Thus we submit that here there is no "real and embarrassing conflict of opinion and authority between the circuit courts of appeal."* Petitioner's argumentation respecting this asserted "conflict" is without substance. In no respect does it warrant review by this Court.

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*Layne & Bowler Corp. v. Western Well Works, Inc., 261 U. S. 387, 393.

4. The denial of the Writ will not prejudice the Government's enforcement of Section 7.

Lastly, the Petitioner, in seeking to induce this Court to grant certiorari, has resorted to exaggerated characterizations of the "importance" of this case. These range from statements describing this as a "pilot case of major significance" to the preposterous prophecy that the effect of the decision below would be to *"foreclose all* effective enforcement action against conglomerate mergers." Pet., pp. 11-12, 18.

These are palpable overstatements. For the decision below represents nothing which would foreclose or hamper any proper enforcement activities of the Commission. It recognizes that conglomerate mergers are proscribed by Section 7 when a finding of illegality is supported by substantial evidence, as it was in *Consolidated Foods* and *Ekco.* The only "standard" to which Petitioner can fairly say it has been held by the decision here is that it cannot premise its decisions solely upon conjecture and speculation.*

We repeat, the decision below is limited to the facts and circumstances reflected in this record. It is the Petitioner's studied refusal to recognize this which underlies its magnification of the significance of this case.

We further note that the Petition artfully seeks to avoid the impression that it is urging this Court to enunciate some *per se* rule applicable to conglomerate mergers. It says:

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*In line with other exaggerated assertions as to the importance of this case is the claim that "the decision below casts a serious cloud over a major law enforcement program" of the Commission in attacking conglomerate mergers. Pet., p. 10. References are made to extra-record statistics as to the number of conglomerate mergers in the last four years, as well as to "plans" of the Commission to attack them. Pet., pp. 10-11. Whatever these "plans" may embrace, Commission policy cannot extend its enforcement function beyond the bounds fixed by law.

> "The Commission did not suggest in its opinion—and we do not suggest here—that all such mergers are within the ban of Section 7." Pet., p. 8.

and again:

> "Of course, not all—or even most—such mergers are harmful to competition." Pet., p. 10.

But when Petitioner argues that the "substitution" of Procter for Clorox, without more, "justified the Commission's prediction that in the long run competition is likely to suffer substantially" (Pet., pp. 14-15), it belies its own protestations. For all of the statements in the Petition as to why such "substitution" would warrant the Commission's assumptions simply relate to hypothetical effects associated with the "size" of Procter. Thus, Petitioner, despite its disavowals, seeks to secure in this proceeding the equivalent of a "rule of thumb" of general application that size alone can be determinative in a Section 7 case.

The court of appeals dealt with this concept and rejected it as a decisive factor on this record. It said:

> "We do not believe these tests [of legality] should involve application of a per se rule.
>
> "The Supreme Court has not ruled that bigness is unlawful, or that a large company may not merge with a smaller one in a different market field. Yet the size of Procter and its legitimate, successful operations in related fields pervades the entire opinion of the Commission, and seems to be the motivating factor which influenced the Commission to rule that the acquisition was illegal." Op., p. 37.

The true thrust of the Petition is to have this Court immunize the Commission from compliance with the stand-

ards of the Administrative Procedure Act and the rulings of this Court. It is seeking a mandate from this Court to dispense with the requirement that the link between the merger and its probable effect on competition be established by substantial evidence. It thus is espousing some rule of law which runs counter to this Court's decision in *Consolidated Foods,* 380 U. S. at 604, and to the decision of the Seventh Circuit in *Ekco,* 347 F. 2d at 751. No valid reasons are advanced why this Court should entertain any review of this case to consider contentions which are at odds with well grounded legal principles.

Particularly is this so here where the court of appeals has determined that the very "assumptions"—which Petitioner urges were justified by the mere "substitution" of Procter for Clorox—have been negatived by the evidence in this record. For, in its consideration of the evidence, the court of appeals dealt with each of the assumed advantages and each of the assumed adverse effects which Petitioner claims would stem from the size of Procter. See Pet., pp. 5-6. As to these, it determined that the Commission's assumptions were not supported by substantial evidence. Op., pp. 27-30. And, as further reflecting on the validity of these assumptions, was the circumstance that in the years following the acquisition the court of appeals found no proof that any anti-competitive effects resulted from the merger. Op., pp. 31-34. The import of the court's determination cannot be obscured by Petitioner's attempt to divorce the decision below from the record.

Thus, when the Petitioner says that review by this Court is necessary to provide the Government with "adequate legal tools" (Pet., p. 10) to deal with conglomerate mergers, it has simply closed its eyes to the realities of this case. The Commission did not lose here because of any inadequacy of its "tools". It lost because of the "inadequacy" of evidentiary support for charges which it was the Commission's burden to sustain.

CONCLUSION

Paraphrasing the Opinion of the court of appeals, this protracted litigation which is now entering its tenth year should come to a close. We respectfully submit that the Petition should be denied.

Respectfully submitted,

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